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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLTON H. BROOKS,

Defendant and Appellant.

D041728

(Super. Ct. No. SCD166244)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh and Melinda J. Lasater, Judges. Affirmed.

A jury found Carlton H. Brooks guilty of five counts of robbery (Pen. Code,¹ § 211 [counts 1, 2, 6, 7 & 8]), one count of attempted robbery (§§ 211, 664 [count 5]), six counts of assault with a firearm (§ 245, subd. (a)(2) [counts 3, 4, 9, 10, 11 & 12]), and one count of being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1) [count

¹ All statutory references are to the Penal Code unless otherwise specified.

13]).² The jury also found true allegations Brooks had intentionally and personally discharged a firearm within the meaning of section 12022.53, subdivision (c) during the commission of the attempted robbery and the robberies, and had personally used a firearm during the commission of the firearm assaults (§ 12022.5, subd. (a)(1)). Finally, the jury found true allegations Brooks had suffered a serious felony conviction which also constituted a "strike" under the Three Strikes Law. (§§ 667, subd. (a)(1); 667, subds. (b)-(i); 1170.12.)

After denying Brooks's motion for a new trial on grounds of jury misconduct, the trial court sentenced him to a total prison term of 66 years, consisting of the upper term of 10 years (five years doubled pursuant to the three strikes law) for the count 1 robbery, plus 20 years for the section 12022.53, subdivision (c) firearm enhancement; consecutive eight year, eight month terms for the robberies in counts 2, 6, 7 and 8 (1/3 the midterm for the underlying counts (two years each) and section 12022.53, subdivision (c) firearm allegations (six years, eight months each)); and a consecutive term of one year, four months for being an armed ex-felon in count 13. The court ran the sentence imposed on the count 5 attempted robbery and its firearm enhancement concurrent to the other sentences, and stayed the terms imposed for the firearm assaults and their enhancements in counts 3, 4, 9, 10, 11 and 12 under section 654.

Brooks appeals, contending the trial court violated his constitutional rights and abused its discretion in failing to appoint counsel for him and in denying his motion for

² The jury found Brooks not guilty of the alleged count 14 discharge of a firearm in

new trial based on juror misconduct. He also claims the trial court prejudicially erred in admitting evidence of his prior "bad acts" and in instructing the jury with the flight instruction (CALJIC No. 2.52) because identity was a contested issue. Brooks further asserts the prosecutor committed prejudicial misconduct by improperly commenting on his failure to submit certain evidence to DNA testing and thereby shifting the burden to him to prove his innocence. Finally, in a supplemental brief, Brooks contends section 654 precludes a consecutive six-year, eight-month term for the firearm enhancement accompanying the count 8 robbery. We affirm.

FACTUAL BACKGROUND

Because Brooks does not challenge the sufficiency of the evidence to support his various convictions, we merely summarize the facts to provide background for those facts pertinent to his contentions of error which will be developed more fully in the respective discussion of those issues.

On December 26, 2001, a masked suspect, armed with a sawed-off shotgun, entered the Encanto Liquor Store in Lemon Grove, discharged the shotgun and robbed two employees of the money in their registers, having them put the money in plastic bags. On January 18, 2002, a masked suspect, armed with a sawed-off shotgun, entered the Henry's Market in Pacific Beach, discharged the shotgun and demanded money from the employees at the registers, telling them to put the money in plastic bags. Subsequently, on February 19, 2002, as police pulled over to investigate a car stopped alongside the road which was driven by Janel Hewitt near the intersection of 65th Street and Brooklyn

a grossly negligent manner in violation of section 246.3.

in Lemon Grove, a man got out of the passenger side of Hewitt's car, walked or ran some yards away before turning to face the officers while he tried to pull something out from underneath a long jacket. A gunshot went off and the man jumped as if startled and ran. At some point, the man made a "throwing down motion" when a police officer ran after him. When the officer reached that point, he found a pump action 12-gauge, sawed-off Mossburg shotgun. The weapon contained one expended shell casing in the chamber and at least one live round in the magazine.

The officers then contacted Hewitt in her car. Hewitt, who knew Brooks as "Trent," told the officers the man who had run from her car was named Trent and she gave them his address, which was to a motor home in a nearby canyon area.

Further investigation revealed that the shell casings recovered from the Encanto Liquor Store and Henry's Market robberies were fired from the same shotgun recovered on February 19, 2002, which was connected to Brooks. A subsequent search of Brooks's motor home pursuant to a search warrant led to the discovery of a black mask, plastic shopping bags from Henry's Market and Encanto Liquor Store, a black bag and items of clothing matching descriptions of the clothing the suspect wore who was involved in the earlier robberies of those businesses.

Brooks was thereafter charged with crimes arising out of all three incidents and proceeded to jury trial. In addition to the above evidence, the jury heard the following regarding each incident. With regard to the Encanto Liquor Store robbery, the jury learned from the testimony of the two victims, Wessam Rabban and Abhram Zengilou, that the person who robbed them was a Black male who, after entering the store masked

and armed, jumped over the counter near Rabban, pointed the shotgun at his chest and yelled, "Give me your money, mother fucker." The man then shot out the screen of a television set above Rabban's head which served as a monitor for the security cameras throughout the store. As Rabban emptied the money from his register into a white plastic bag and handed it to the man, the man shot into the ceiling and demanded money from Zengilou. The man took the bags of money and put them in a black bag and left the store.

A customer, who was driving to the Encanto Liquor Store that night, witnessed the man who eventually robbed the store as he approached it, putting on his mask and loading his shotgun, and then again saw the man leave the store still masked and carrying a bag and a pump-action shotgun. In between, the customer heard someone say, "Give me the money," and two shots being fired.

At trial, Rabban and Zengilou recognized Brooks as a customer of the liquor store before the robbery whom they had not seen at the store since that time. Neither was able to identify Brooks as the robber because the robber wore a mask throughout the crimes. Nor was the customer able to identify Brooks as the robber because he had not seen the robber's face. All three, however, described the robber as having the same height and build as Brooks.

Rabban and Zengilou also described the black pants, black sweat shirt, black mask with eyeholes cut out and gloves that the robber wore. The shotgun recovered on February 19, 2002 resembled the sawed-off, pump-action shotgun with a wood stock that Rabban had observed the robber use. Rabban also said the black bag in evidence

obtained in a search of Brooks's motor home resembled the one the robber carried out of the store with the money. A videotape of the robberies from the store's security cameras was shown to the jury.

With regard to the Henry's Market's robberies and assaults, the masked and armed suspect entered the store, fired a shot at the ceiling and yelled to the people working or near the registers (Ryan Young, Adam Martinez, Frank McQuown, and Carly Meyers), "No fucking around, put the money in the plastic bags." As Martinez fumbled with his register, the suspect fired a second shot which broke the glass of an ice machine. The suspect then began collecting the bags with money from each register. The suspect left the market before collecting the money from Meyers's register.

At trial, Young, Martinez, McQuown and two other employees, who worked in the market and witnessed parts of the events, testified about the robberies. It was also captured on videotape by the market's security cameras, which was shown to the jury. All described the robber as having the same physical characteristics as Brooks, including his long and braided hair. Young and Martinez described the dark clothing, jacket, gloves, distinctive "do rag," and loose-fitting black mask made out of a sheet or tee-shirt, with cut-out openings for the eyes that was worn by the robber. Several of the employees testified the shotgun in evidence was either the one used in the robberies or similar to it.

An employee of Henry's who had walked out of the market to the parking lot the night of the robberies, testified about seeing the suspect in a dark long jacket, dark pants, a black mask and a hood over his head approach the entrance of Henry's, pull out a shotgun from under his jacket and then fire a shot upon entering the market. As soon as

the employee heard the shot, he ran through the parking lot to a bar where he told the bartender to call the police. When the employee returned to Henry's parking lot, he hid behind a corner of the building while he observed the suspect walking away from the market with the shotgun in his left hand and a white plastic bag in his right hand. After the suspect walked through an alley, he started running. At some point, the man's mask came off and the employee noticed that the suspect had long black hair.

A customer in his car in the parking lot of Henry's Market that night saw the employee running across the lot from the store's entrance and then saw a flash out of the corner of his eye at the same time he heard a bang. Staying in his car, the customer observed a Black man casually walking out of the market a short time later, carrying white plastic grocery bags and a gun. As the man, who wore dark clothing and a "do rag" bandana on his head, crossed the parking lot to a major street, he dropped one of the bags and continued walking until the customer lost sight of him. After discovering that Henry's had just been robbed, the customer retrieved the bag, which contained wrapped bills, dropped by the man who was approximately the same size as Brooks, and turned it over to a police officer who had arrived on the scene. The customer identified the gun in evidence as similar to the one he saw the suspect with the night of the Henry's Market robberies.

When a man in the apartment complex across the street from Henry's parking lot the night of the robberies heard someone running through the walkway near the laundry room, he looked outside and saw a man in a dark trench coat with his hair in corn rows, wearing a "do rag" and carrying a sawed-off shotgun and a paper bag in his right hand

run past and down an alley. The man who ran past, described as either Black or Puerto Rican with medium skin color, resembled Brooks. The man in the laundry room said the shotgun in evidence looked the same as that carried by the man who had run past him that night.

Hewitt and several police officers testified about the February 19, 2002 car stop incident. Hewitt had met "Trent" through an ex-boyfriend and she visited him frequently at his motor home to talk and smoke marijuana. Hewitt, who had her own car, sometimes drove Trent on errands or to the grocery store, including to the Encanto Liquor Store and Henry's Market in Lemon Grove. Although Trent did not work, he had money through selling marijuana. In December 2001, Hewitt had driven Trent to a Big Five sporting goods store at College and El Cajon Boulevard where he asked her to buy some bullets for him because he was having problems with his neighbors and needed them for his protection. Trent could not buy the bullets because he had been convicted of a felony.

On the night of February 19, 2002, Hewitt saw Trent, who was wearing a long dark jacket, dark pants and gloves, walking on Imperial Avenue as she drove down a hill near the Encanto Liquor Store, and she agreed to give him a ride home. As she drove down Brooklyn Avenue, he told her to pass the footpath where she normally dropped him off to go into the canyon area where his motor home was located and to pull over after they passed another street. When she did so, turning off her lights at his direction, a police car pulled in front of her car with its headlights shining on her car. When Hewitt rolled down her window to talk to the officers, she heard a shot and saw Trent run away from her car. An officer ran after him and one stayed with her. Hewitt had not seen

Trent with a gun in her car. She identified Brooks at trial as Trent and the person who got out of her car the night in question. Brooks called her several days later and asked Hewitt what information she had given the police about him.

The police officer who ran after the man getting out of Hewitt's car also identified Brooks at trial as the passenger in Hewitt's car who later dropped the shotgun which was admitted into evidence. The officer had been able to see Brooks's face when he stopped and turned back toward the officer from a distance of about 20 yards.

Before the prosecution presented evidence of Brooks's prior bad acts via the testimony of San Diego Police Detective Thomas Wagner who had been part of a surveillance team in the North Park area of San Diego on February 28, 1994, certified documents showing that Brooks had been convicted of conspiracy to commit armed robbery, of felony evasion of a police officer and of carrying a loaded firearm at that time were entered into evidence. With regard to the prior bad acts, Wagner had observed Brooks and a companion "casing" the area across the street from a business for approximately an hour and 20 minutes. They hid in the shadows of an apartment complex when a marked patrol car drove through the area. At that time Brooks was wearing a hooded sweatshirt, a dark, knee-length trench coat, and gloves.

Eventually, Brooks and his companion walked two blocks to a car, drove back to the area where they had just cased, parked, and walked some more around the area, hiding again when another marked patrol car drove by. After about 20 minutes, the two returned to the car and Brooks drove off. Wagner called for a marked patrol car to pull Brooks's car over to investigate the occupants' suspicious activity. When the officers did

so, Brooks pulled over, his passenger got out and walked quickly away, and Brooks then sped off with the patrol car in pursuit. After a high speed chase, Brooks lost control of his car, and when it came to rest, he ran and was eventually apprehended. Brooks was wearing two sets of clothing, including two pair of pants and two shirts under his trench coat.

In a search of Brooks's car, Wagner found a 12-gauge, pump-action Mossburg shotgun with an 18-inch barrel, a faded red tee-shirt that had been knotted at the top and had holes cut out for the eyes, a pair of gloves and two lengths of yellow, polypropylene rope. In Wagner's experience, such rope was used to fashion a sling so a shotgun could be held and concealed beneath a trench coat. Wagner had watched the videotape of the Encanto Liquor robbery and noted that the robber had used a similar makeshift sling to carry the shotgun on that occasion.

In his defense case, Brooks called Zengliou from the Encanto Liquor Store robbery and the man in his laundry room who had seen the fleeing robber of the Henry's Market. Zengliou acknowledged that a receipt found in Brooks's motor home showed he had shopped at the liquor store on March 13, 2002, sometime after the robbery, and that at some earlier time he had had an argument with Brooks.

The man from the laundry room stated he had been taken by the police later the night of the Henry's Market robbery to a location nearby where they had detained a tall Black man with dreadlocks who had been skateboarding for viewing. Although the man had different clothing than the man who had run by the laundry room, the man could have been the suspect. At trial, the man from the laundry room testified Brooks could be

the man with the dreadlocks and skateboard. However, because he did not see the face of the man who ran by the laundry room, he would not be able to identify that man if he saw him again.

DISCUSSION

I

The Right to Appointed Counsel

Brooks, who represented himself at trial, contends the trial court prejudicially abused its discretion by failing to fairly evaluate his requests for appointment of counsel. After reviewing the pertinent background and procedural facts on the matter in light of the relevant law, both of which we set out below, we conclude no prejudicial abuse of discretion has been shown.

A. Pertinent Background and Procedural Facts

Brooks was initially appointed counsel on March 18, 2002. After several hearings where Brooks appeared represented by counsel Stacy Gulley from the Public Defender's office, Brooks made a motion on June 5, 2002, to waive his right to counsel and to exercise his right to represent himself. After advising Brooks of the risks and consequences of self representation (that he would not be given any special treatment just because he represented himself, that he had the right to an attorney "at any time that you think you're in over your head in this matter," that he would be entitled to library privileges, that he had the right not to testify, that the trial court could terminate his proper rights at any time for disruptive behavior, and that it was not in his interests to represent himself), questioning him about his background, training and education,

including his understanding of the charges and possible sentence, the court found Brooks had made a voluntary, intelligent and understanding waiver of his right to counsel, and granted the motion. The court then relieved counsel of record, and appointed an investigator and a legal runner for Brooks. The court accepted for filing Brooks's signed and completed "Acknowledgement Concerning Right of Self-Representation (*Lopez* Waiver)."

At Brooks's readiness conference on July 31, 2002, he asked questions about filing motions for dismissal under section 995 and for discovery. He then asked to have his counsel that had been appointed in another robbery case, filed after this instant case, appointed in this case. After making sure Brooks wanted an attorney for the present case and understood that appointing one would delay the trial, Brooks waived time. The court noted there was a possibility that Brooks could be represented by the same attorney on both cases, but that currently it appeared the attorney (Mr. Martin) on Brooks's other case was declaring a conflict because his office had represented a witness on that case. The court trailed the matter to the next day, stating it would have an attorney there to represent Brooks. The court also advised Brooks he could go ahead and file his motions, or wait to have his attorney take a look at them before filing them.

There is no reporter's transcript of the proceedings on August 1, 2002. However, the court minutes show that the court voided the July 31, 2002 minutes relating to the revocation of Brooks's pro per status and ordered that a determination be made at the next hearing whether Brooks wanted to remain in pro per or have counsel appointed.

On August 7, 2002, Brooks appeared in court, represented by a Mr. Charles Guthrie on his other case. When the court told Brooks he was to tell the court whether he wanted to continue in pro per on this case, Brooks informed the court he did not have full discovery and did not wish to make a decision regarding representation until he received full discovery.³ Because the prosecutor was unable to determine what discovery Brooks was missing, she informed the court she would provide another complete copy of the discovery for him. When the court told Brooks that he would have discovery by the end of the day and that he would have to make a decision the next week on whether he wanted to stay pro per on this case, Brooks said, "I can tell you now I'll be pro per." The court then said Brooks could review the discovery and tell the court at the hearing the next week, "how much longer [he] need[ed] to go on [this] case [for a continuance]." The court then turned its attention to Brooks's other case, which was also continued to the next week.

At a trial call in this case on August 14, 2002, Brooks appeared in pro per and the matter was trailed to August 20, 2002. On August 20, the matter was assigned to a trial department. The minute order from the trial department that date reflects Brooks was to determine on August 21, 2002, whether he wished to proceed in pro per or if he wanted

³ Brooks explained the discovery he believed to be missing were police interviews of witnesses on the night of the crimes in this case. Throughout the trial, he made references to these missing interviews. At one point, the court ordered the lead police officer on these cases to contact every officer who had any involvement in the case to find out if any reports were made that were not included in discovery. No reports were found. From this it is apparent that Brooks had full discovery from the beginning of the

to request appointment of counsel, and that someone from the Public Defender's office was to be present.

On August 21, 2002, the court indicated that Mr. Gulley from the Public Defender's office would be Brooks's attorney if he wished to have counsel appointed. When Brooks continued complaining about not having received full discovery, the trial judge responded:

"Hang on. I need to know what you want to do. If you're going to represent yourself, we'll continue down this road. [¶] If you're not going to represent yourself, then it's all moot. It means it doesn't have any impact. It's not worthwhile pursuing it because then your attorney would take over and decide what your attorney wanted by way of discovery."

When Brooks still continued to discuss discovery, the court again informed him he needed to first decide whether he wanted an attorney appointed, which he had requested the previous day.⁴ The trial judge then stated:

"It's difficult for me to come up with a trial date. [¶] If you decide that you're going to represent yourself, then any other request for an attorney, I will rule that it's being done tactically, it's abusive in the sense that you're trying to avoid the trial date, and I'll deny the motion. [¶] This is the time to make your final decision."

Because Brooks refused to answer the court and continued complaining about discovery, the court yet again explained discovery would have to be taken up after Brooks decided whether or not to proceed in pro per. Brooks then said, "I'm going to represent myself," and the following colloquy took place:

case but felt some discovery was missing because he believed reports which never existed should have been made and included in discovery.

"THE COURT: Okay. That's your final answer on that issue?

"MR. BROOKS: Well, I don't know if that's my final answer, but today I'm telling you I'm going to represent myself.

"THE COURT: Do you understand that if you ask in the future to [have the court] appoint an attorney that my answer is going to be no, you'll have to do it by yourself, do you understand that?

"MR. BROOKS: Yes, I understand that."

The court then excused the deputy public defender appearing in court for Brooks, and moved on to the various pretrial matters. After reviewing the discovery requests, the court granted Brooks's request for more investigative time and his request for a dress out order for trial. He also set dates for Brooks's section 995 motion and for trial. Brooks's section 995 motion was denied on September 16, 2002.

On the first day of trial in October 2002, the court granted the prosecutor's motion to file a second amended information which corrected errors in the spelling of a victim's name and changed the word "handgun" to "sawed-off shotgun" in the section 12022.53, subdivision (c) allegations. In doing so, the court overruled Brooks's objection to the changes "just on principle, that this is a case of mistaken identity," stating he had proper notice of the charges, that the changes were merely "ministerial" and did not alter the "import or the content in any significant way of the charges which have been filed."

When the court arraigned Brooks on the second amended information, asking him how he pled to the charges, Brooks replied, "Well, at this time, your honor, I'm going to take advantage of my right to counsel." The court denied the request, stating it had told

4 The record does not contain a reporter's transcript for August 20, 2002.

Brooks he needed to decide before the trial date whether he was going forward with or without counsel. Because he had made the decision to go forward in pro per, the court's readvising Brooks of the right to counsel with the amendment of the information did not mean the court would appoint an attorney at this time. When the court again asked Brooks whether he was pleading guilty or not guilty to the amended charges, the following discussion occurred:

"MR. BROOKS: Well, if I can add one more thing for the record, I'll go ahead and plead guilty or not guilty.

"THE COURT: Go ahead.

"MR. BROOKS: Well, I was first given a public defender, and then an alternate public defender. Then of course, a lawyer from the private conflict counsel's office who just had one of the cases against me dismissed. [¶] It was my intention to have him represent me in this case; however, when you, on [August 21, 2002], suggested that I go back to the Public Defender's Office as far as counsel is concerned, or not be represented at all, my feelings then were I was being coerced into maintaining my pro per status simply because I had a conflict. I felt I had a conflict with the public defender's office. [¶] And it was the public defender initially who didn't object to my prior convictions being offered as exhibit one in the People's case against me. [¶] So, those are the reasons why I maintained a pro per status.

"THE COURT: Well, Mr. Brooks, I think [your] action today is manipulative. I think the record speaks very clearly for itself in terms [of] what I said and what you said, and what your requests and efforts were at the earlier times. [¶] I am not going to appoint an attorney."

The court then heard and ruled upon further in limine motions and commenced jury voir dire which continued throughout the next day.

On October 17, 2002, the third day of trial, after the jury was selected and the court had entertained Brooks's objections to the admission of certain evidence and had addressed his concern regarding one of the prosecutor's questions during voir dire, the court entertained the prosecutor's motion to file a third amended information to add allegations regarding Brooks's 1994 prior conviction as both a serious felony prior and a strike prior. When the court asked the prosecutor whether this was late notice of the allegations, she responded that the prior conviction had been admitted into evidence at the preliminary hearing and that she was entitled to amend the information to allege a prior conviction at any time, even post-trial. Brooks objected to the 1994 prior being mentioned in the amended information, even though the court had already ruled it would be admitted into evidence for purposes of the ex-felon in possession of a firearm charge and the underlying facts of that conviction were coming in under Evidence Code section 1101, subdivision (b).

The court informed Brooks generally of his option of stipulating to having a felony conviction regarding the ex-felon offense and to have a bifurcated trial on the prior. The court specifically informed Brooks that if he did not stipulate to the conviction, the evidence of his conviction would come in to prove the felon in possession of a firearm charge and bifurcation would be meaningless "because that same prior conviction is a conviction that [the prosecutor is] adding for purposes of the [third amended] information. The court explained in depth what bifurcation would mean for Brooks. Ultimately, he decided not to stipulate or bifurcate the trial, saying he wanted

the prosecutor to "prove everything." Thereafter, the court granted the prosecutor's motion to file the third amended information.

When the court arraigned Brooks on the third amended information, he stated, "I'd, at this time, like to take advantage of my right to be represented by counsel." The trial judge replied:

"And I'm giving the same ruling I made before, which is that you've chosen to represent yourself. You've waived that right. [¶] I realize that there is case law that specifically does say that a defendant needs to be readvised at the time of arraignment after preliminary hearing to confirm they want to continue to represent themselves. [¶] I look at the situation as being very different. It is one where we are now -- we actually have a jury that's sworn in, and that this was a decision that Mr. Brooks made a while ago. [¶] He's obviously prepared for trial. He has been preparing for trial. And I think this is really just a tactical maneuver on his part and a delay tactic as well. [¶] I gave you adequate opportunity to have an attorney appointed previously. So, the answer is no."

Brooks complained that on August 21, 2002, he was told by a judge that if he wanted to surrender his pro per status, he would have to accept an attorney from the Public Defender's Office, the same office that provided him with counsel who was conflicted out at a *Marsden*⁵ hearing in another case against him. Brooks stated:

"And, so based on that, I felt that not only did I have a right to a P.C.C. [Private Conflicts Counsel], but I was being forced into maintaining my pro per status by that ruling of the judge in this court, [Department] 32. [¶] So, I felt coerced into maintaining my pro per status. And, as a result of being forced to go back to the Public Defender's Office with whom I believe I had a conflict, I just opted to maintain pro per status."

⁵ *People v. Marsden* (1970) 2 Cal.3d 118.

The court then explained that because Brooks had asked to represent himself and the public defender representing him at that time had been relieved, the court would follow protocol in appointing counsel if it were to do so at that time and thus would appoint the Public Defender's Office again. The court also reminded Brooks that at one point it had made an effort to have a representative of that office present for his pretrial hearings. When the court also noted that no *Marsden* motion had been granted in this case and told Brooks, it was his "choice, under the circumstances, to go ahead and represent [him]self, and continue to do so," he responded,

"Well, Ma'am, I understand that you have a protocol that you have to govern your actions by, but I clearly had a conflict with counsel given to me by the Public Defender's Office in that he had just a high case load. I felt an hour a day on my case wasn't enough [¶] I conflicted -- I went through the public defender's office, the alternate public defender's office, and P.C.C., and it was through P.C.C.'s representation of me that I was able to get one of the two charges dismissed. [¶] Now, whether it was counsel's lawyering, or just simply a realization on the part of the prosecution that the charge simply wouldn't stick, it was dismissed. [¶] I was expecting to surrender my pro per status and get a private conflict's counsel lawyer with whom I felt I had no conflicts, simply because I was pro per on one case, and the private conflicts counsel lawyer was defending me on another and the case was dismissed. [¶] The lawyer wasn't able to speak to me because I was in Department 11 in a glass enclosure. [¶] The district attorney was out there with him, and I was just simply left, at that point in time. And I was told that - three days after that I would show up in this courtroom. [¶] Not some two hours later I was here and being pressured into whether or not to accept the public defender's office after I had shown a desire to surrender my pro per status. [¶] So I was pressured, and kept in the dark, and confused by the court officers in [Department] 11, and in this one as it pertains to my representation and the right thereof."

The trial judge commented:

"Well, I think that the minutes and the transcripts of the hearings will show a little bit different variation of what occurred than what you just recited. [¶] It is my recall, but, again, the record will be whatever it has been, because I'm not going to go back and undo what has already occurred. Because I believe that the A.P.D. had a conflict on the second case. But as I see in our minutes on this case, it was always the P.D., and then you represented yourself. [¶] And I know of no conflict of interest in the sense of representing maybe a witness or something like that in this case that the P.D. has. So, I would be required to go back to the P.D., and would do it."

Subsequently, after six days of trial, on October 24, 2002, out of the presence of the jury, the court addressed Brooks's claim that he was being forced to represent himself. The court commented it had not fully stated on the record its analysis of why it had earlier denied Brooks's two requests for counsel. Citing *People v. Gallego* (1990) 52 Cal.3d 115 (*Gallego*), and *People v. Elliott* (1977) 70 Cal.App.3d 984 (*Elliott*), the court listed and analyzed each of the factors it had considered in making its earlier rulings. The court had considered Brooks's prior history and desire to change from self-representation to counsel representation, the reasons for his requests to change back to counsel representation, and the length and stage of the trial proceedings at the time of his requests, indicating that when Brooks made his first request, the parties had gone through numerous in limine motions and witnesses had been subpoenaed, and that when he made his second request, the jury had already been empaneled and additional motions heard. The court also had considered the disruption or delay which reasonably might have been expected to occur had counsel been appointed when Brooks made his requests and the likelihood of Brooks's effectiveness in defending against the charges if he continued to act as his own attorney.

Concerning Brooks's request for counsel when he was arraigned on the third amended information, the court had also considered that the additional allegation of his prior conviction did not change the evidence that would be presented at trial because Brooks had not stipulated to the prior with regard to the felon in possession of a firearm charge. The only issue that concerned the court in allowing the third amended information to be filed was that it exposed Brooks to 81 years in prison, when his *Lopez* waiver indicated he was only exposed to 72 years. However, the trial judge noted:

"In terms of length of years, it's -- you know, nine years is nine years, but it is not a great change in terms of the amount. And I think it could be effectively argued that perhaps the court is even limited if there were a conviction. Emphasis on "if." A big if. Then the court then may be limited to no more than the [72] years on the *Lopez* waiver, but that's an argument that could later be made."

Thus, the trial judge found that "[t]he exposure issue was no longer weighing heavily in my evaluation of the situation and the request for the appointment of counsel at the stage we were at, in light of the total history, and in the end . . . the case law says, that it's the totality of the facts and the circumstances in exercising the discretion."

Finally, the court concluded that, ". . . the record is clear in several regards. Number one, the attempts and the offers that were made earlier on to appoint counsel, as well as, frankly, the very good job Mr. Brooks has been doing in representing himself."

B. The Applicable Law

Once a defendant has proceeded to trial on the basis of his constitutional right of self-representation, it is "within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel

appointed for him." (*Elliott, supra*, 70 Cal.App.3d at p. 993.) We review the denial of a defendant's midtrial request for appointment of counsel after waiving the right to representation for an abuse of discretion. (*Gallego, supra*, 52 Cal.3d at pp. 163-165.)

As our Supreme Court has stated, in the situation where "a self-represented defendant who, after commencement of trial, seeks to relinquish responsibility for his own defense and obtain the appointment of counsel to represent him for the remainder of the trial[,] the . . . factors [set forth in *People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*)] apply and . . . the trial court must consider the totality of the circumstances in exercising its discretion. [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 149.) *Windham* had concerned the factors to be considered by a trial court in the reverse scenario, where a defendant attempted midtrial to invoke his right to self-representation. (*Windham, supra*, 19 Cal.3d at pp. 127-128.) In *Gallego, supra*, 52 Cal.3d 115, the Supreme Court indicated these same factors were relevant to the situation in this case. (*Id.* at pp. 163-164.) Those "[r]elevant factors . . . include, among others, the following: (1) defendant's prior history in the substitution of counsel and the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. [¶] As in *Windham*, a trial judge must establish a record based upon the relevant factors involved and then exercise [her] discretion and rule on defendant's

request for a change from self-representation to counsel-representation.' [Citations.]" (*Gallego, supra*, 52 Cal.3d at p. 164.)

Further, "[w]hile the consideration of [the above] criteria is obviously relevant and helpful to a trial court in resolving the issue, they are not absolutes, and in the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial." (*Gallego, supra*, 52 Cal.3d at p. 164, quoting *People v. Smith* (1980) 109 Cal.App.3d 476, 484.)

C. Analysis

Brooks asserts the trial court abused its discretion in denying his two requests for appointment of counsel because it failed each time to fairly evaluate all of the facts enunciated in *Gallego, supra*, 52 Cal.3d. 115. Brooks fails to persuade us the trial court abused its discretion on this record. Although the trial court did not make a complete record at the time of each ruling, it did so later in trial when Brooks attempted to prejudice the jury in his favor by claiming he was being forced to represent himself. The court's analysis of each of the *Windham* factors on the record and its conclusion that Brooks was doing well in representing himself and was basically just requesting counsel due to his manipulative proclivity of changing counsel for delay purposes is fully supported by the totality of the facts and circumstances which the trial court had before it.

Regarding his prior history in the substitution of counsel, as noted above, Brooks changed his mind from time to time concerning the appointment of counsel. Although he had another case in which several counsel represented him due to a conflict, in this case

his original representation was with a public defender. Although Brooks stated he had attempted to replace the public defender due to a conflict, none was ever shown with regard to this case, and no *Marsden* hearing was ever requested as it had been in the other case. Rather, Brooks's proclivity to change his mind regarding appointment of counsel or self-representation in this case appears to have been merely a delaying maneuver which was manipulative and tactical as the trial judge so found.

As for Brooks's reasons for wanting counsel appointed, his first request the first day of trial stated he felt compelled to maintain his pro per status because the court would not appoint his counsel of choice when he believed he had a conflict with the Public Defender's Office. Brooks, however, never informed the court of any conflict before trial, nor did he explain what that conflict was at the time of the first request after the reading of the second amended information. When he made his second request for counsel several trial days later after the reading of the third amendment to the information, Brooks's stated reasons were similar to those he had made for his first request. Brooks continued to believe there was a conflict with the Public Defender's Office, claiming he had not surrendered his self-representation because the court would only appoint counsel from that office. However, Brooks again did not indicate what the conflict was, but rather explained he had had a conflict in the other case, and that the Public Defender's Office had been conflicted out after a *Marsden* hearing. This record reveals that Brooks was aware of the process of having the Public Defender's Office appointed, and then having to request a *Marsden* hearing to have counsel replaced if a conflict were found to exist. Brooks, as the trial judge noted, did not show that the Public

Defender's Office had a conflict in this case. That Brooks later indicated he had a "conflict" with the public defender assigned to his case because he did not feel the attorney had enough time to spend on his case did not change this conclusion. The amount of time an attorney spends on a case or the number of times an attorney meets with a defendant does not show incompetence or a sufficient legal conflict warranting substitution of counsel. (*People v. Valdez* (2004) 32 Cal.4th 73, 96, quoting *People v. Hart* (1999) 20 Cal.4th 546, 604.)

Although the first request came before testimony was presented to the jury, numerous pretrial motions and status conferences had been held, and several in limine motions had been determined and voir dire was set to begin. Brooks's second request came after the jury had been empaneled and the major in limine motions completed. Witnesses were in court and evidence was to be presented that day. Bringing an attorney into the case at either of these stages, after the court had already allowed considerable delay for Brooks as pro per to prepare for trial, would have necessitated further substantial delay in the trial. Further, the appointment of counsel after the jury had been empaneled would have called into doubt the jury's continued availability and militates against appointing counsel at Brooks's request.

As for Brooks's effectiveness in defending against the charges, the record supports the trial court's finding that he showed impressive skill and intelligence in representing himself. Brooks not only successfully interposed objections, cross-examined prosecution witnesses, and presented evidence in his own defense, at the early stages of the case he had successfully prevailed in obtaining continuances and other rulings regarding

discovery, library time, and dress-out orders. Contrary to his claim that his sentencing exposure due to the third amended information made it unlikely he would have success in representing himself, his sentencing exposure had nothing to do with the evidence that would be presented at trial because he adamantly refused to bifurcate the proceedings so as to require the prosecution "to prove everything"⁶ before he requested counsel.

Under the totality of the circumstances, we conclude the trial court did not abuse its discretion in denying Brooks's two requests for appointment of counsel made respectively at the time he was rearraigned on the second and third amendments to the information. Brooks had not shown that the trial court failed to fairly evaluate his requests for appointment of counsel.

The Other Crimes Evidence

Brooks next contends the trial court committed reversible error by admitting evidence of his prior "bad acts" which resulted in a 1994 conviction for conspiracy to commit armed robbery. He specifically argues the court committed prejudicial error because the facts underlying the charged offenses and the prior "bad acts" were not sufficiently similar to show identity, or a common scheme or plan, and the court did not conduct the "closely reasoned" weighing process mandated by Evidence Code section 352. Brooks claims the cumulative effect of admitting such evidence prevented his rights to a fair trial. We disagree.

⁶ Brooks's later request for appointment of counsel for purposes of sentencing was granted.

Generally, evidence of other crimes or misconduct is inadmissible when it is offered to show that a defendant had the criminal disposition or propensity to commit the crimes charged. (Evid. Code, § 1101, subd. (a).) However, evidence of other crimes or misconduct by a defendant is admissible if it "' . . . [tends to] logically, naturally, and by reasonable inference . . . establish any fact material for the People, or to overcome any material matter sought to be proved by the defense.'" (*People v. Peete* (1946) 28 Cal.2d 306, 315.) Evidence Code section 1101, subdivision (b), codifies this exception to the general rule of inadmissibility by providing for the admission of such evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the defendant's] disposition to commit such [crimes or bad acts]."

As our Supreme Court noted in *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*):

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.'" [Citations.]' [Citation.] [¶] A greater degree of similarity is required in order to prove the existence of a common design or plan. [I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citation.] . . . [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of

similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he . . . used in committing the uncharged acts. . . . [Citation.] [¶] The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Id.* at pp. 402-403.)

However, even if the other crimes evidence is relevant to prove one of the facts specified in Evidence Code section 1101, subdivision (b), it must also satisfy the admissibility requirements of Evidence Code section 352, that is, its "probative value [must not be] 'substantially outweighed by the probability that its admission [will] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*Ewoldt, supra*, 7 Cal.4th at p. 404, quoting Evid. Code, § 352.) "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging.'" [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Factors increasing probative value include the tendency of the evidence to prove one of the specified facts and the independence of the source of the evidence of uncharged misconduct from the source of the charged offense. (*Ewoldt, supra*, 7 Cal.4th at pp. 404-

405.) Factors increasing prejudice include the absence of a conviction for the uncharged act and the strength and inflammatory nature of the testimony describing that act. (*Ibid.*)

The trial court has broad discretion when deciding whether to admit or exclude evidence under Evidence Code sections 352 and 1101, subdivision (b) and its decision will not be disturbed on appeal absent a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, after hearing argument in limine on whether to allow the prosecution to present evidence of Brooks's conduct underlying his 1994 conviction of conspiracy to commit armed robbery on the issues of identity and plan, the trial judge, citing *Ewoldt*, *supra*, 7 Cal.4th 380, found that:

"The shirt mask with holes, however they're developed, by tearing or cutting, really seems unusual to me. [¶] I can't recall any other like that in my 29 years in criminal law. [¶] It seemed pretty unusual to me when I saw it. [¶] And that particular type of weapon is distinctive, being a particular brand, the type. [¶] And the manner in which the gun is hidden is not controlling. It's an extra supporting factor, but it's not as persuasive in and of itself as the other two items are. [¶] As I evaluate the evidence, and I am cognizant of the fact that the weapon that is in custody that will be, I assume, admitted into evidence, that was found after the person dropped it getting out of Ms. Hewitt's car, has been linked by way of analysis to the weapons in the robberies that are charged. [¶] So, logic dictates that the weapon that was in court was used in the robberies for purposes of my analysis. [¶] I just think it's very distinctive. I think it's very relevant to show who perpetrated the offense. Meaning the facts. Not necessarily the conviction, but the facts surrounding the earlier offense. [¶] . . . [¶] So I'm going to overrule the objection of the defense and allow the facts surrounding the conspiracy to be admitted on the issue[s] of the identity and plan, as well as,

depending upon the way the evidence comes out, with the ropes. [¶] Mr. Brooks has raised an issue having to do with the manner in which the gun is hung. [¶] I didn't need that for purpose[s] of my ruling, but it may be that knowledge of how to hide a gun under a garment would be another basis for which it would be admitted. . . ."

Based on this record, we believe the trial court was well within its discretion to allow the other crimes evidence consisting of the underlying facts of Brooks's 1994 conspiracy to commit armed robbery to be presented on the issues of identity and plan for the robbery counts in this case. As the trial court noted, there was a distinctive similarity in the type of mask and the gun used in the 1994 offense and the one used by the perpetrator of the Encanto Liquor Store and Henry's Market robberies. The mask used in 1994 and the ones used in the instant robberies were described as unique, handmade masks of dark material that tied in the back, were made from a tee-shirt or "do-rag," had holes cut out for the eyes, and came down past the chin. A mask fitting these descriptions was also found in Brooks's motor home. The guns used in both the 1994 crime and the instant robberies were distinctively similar in that they were both 12-gauge, pump action, Mossburg shotguns. In addition, Brooks wore a long, dark coat in the 1994 incident to conceal his weapon, and the perpetrator of the charged robberies wore either a long, dark jacket or sweatshirt to conceal his weapon. Brooks also wore dark, layered clothing in the 1994 crime similar to the perpetrator of the charged robberies in this case. He additionally wore gloves in the 1994 crime and the perpetrator of both charged robberies was described as having worn gloves. Finally, the police officer who found the ropes in Brooks's possession in 1994 opined Brooks had used the ropes as a sling to carry the shotgun under his coat, which was similar to a sling around the perpetrator's shoulder

holding the shotgun as seen in the videotape of the Encanto Liquor Store robbery. Thus, Brooks's conduct in 1994 shared such substantial distinctive and unusual characteristics with the acts underlying the charged robbery offenses as to be highly relevant to modus operandi and in turn to identity for admissibility under Evidence Code section 1101, subdivision (b).

Brooks's claims the above noted similarities are not unique or unusual and are based on generalizations which fail to take into account the details of his acts. It was not necessary for the prosecution to prove the mask and gun used in 1994 were the exact same ones used in the instant crimes for admissibility of the earlier criminal conduct, striking similarities as here are sufficient. (See *People v. Catlin* (2001) 26 Cal.4th 81, 111.) Also, the fact Brooks did not complete a robbery before his arrest in 1994 does not diminish the unique similarities between his actions then in preparation and planning of a robbery and his conduct on the dates of the robberies in this case. Moreover, contrary to Brooks's arguments otherwise, identity of the robber was at issue here and the other crimes evidence was not cumulative of any of the victims' testimony or the videotapes of those crimes from the Encanto Liquor Store or Henry's Market, which did not identify the perpetrator of those robberies.

Additionally, the prejudicial effect of the relevant other crimes evidence did not outweigh its probative value. Although the court did not expressly weigh the evidence on the record, Brooks did not object on Evidence Code section 352 grounds. Nonetheless, because the court found the evidence so highly probative on the central issue of identity of the perpetrator of the two robberies in this case as to be admissible, it necessarily

found the relevance of such evidence outweighed its prejudicial effect. The tendency of the evidence of Brooks's 1994 conduct to prove the identity of the perpetrator of these robberies based on the descriptions of that person by the witnesses (by the distinctive masks and Mossburg, pump-action shotgun), which were corroborated by a source independent of the charged offenses, increased the probative value of the earlier conduct. (See *Ewoldt, supra*, 7 Cal.4th at pp. 404-405.) That Brooks had been convicted in the earlier case ensured that the jury would not confuse the issues and convict him on the current charges to punish him for past conduct. (*Ibid.*) In addition, the evidence of Brooks's earlier conduct was not remote and was far less inflammatory than the evidence of the charged crimes because such did not involve a completed robbery or Brooks's discharge of the shotgun as in the current crimes. (*Id.* at p. 405.) The admission of the other crimes evidence simply did not create an emotional bias against Brooks.

Moreover, any possible prejudicial effect of the prior acts evidence was minimized because the jury already knew about Brooks's earlier felony conviction for conspiracy to commit armed robbery via a certified copy of that conviction entered into evidence to prove the felon in possession of a firearm charge. Also the court's admonishments before the other crimes evidence was presented, and again before deliberations, lessened any prejudicial effect of such evidence. The court told the jury to consider the 1994 other crimes evidence only for the limited purpose of determining if it tended to show a common modus operandi as in the present case, and thus the identity of the perpetrator of the charged crimes; and not to consider such evidence to prove Brooks was a person of bad character or that he had a disposition to commit crimes. Before deliberations, the

court not only again gave the jury instructions limiting the other crimes evidence (CALJIC No. 2.50), it also instructed the jury that evidence admitted for a limited purpose could only be considered for that purpose (CALJIC No. 2.09). We presume the jury understood and followed the court's limiting instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

In sum, on this record, we cannot find that the trial court prejudicially abused its discretion in admitting evidence of Brooks's 1994 other crimes evidence.

III

CALJIC No. 2.52

During jury instruction discussions, Brooks objected to the giving of CALJIC No. 2.52, the flight instruction, because "it wasn't established that [he] was a person who committed a crime, and that [he] gave flight after commission of that crime." Brooks also argued the instruction would only confuse the jury because the identity of the person "who actually took flight was unidentified." The court overruled the objection, finding the instruction appropriate under the use notes to CALJIC No. 2.52.

The court subsequently instructed the jury that, "The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide." (CALJIC No. 2.52.)

Relying primarily on *People v. Anjell* (1979) 100 Cal.App.3d 189 (*Anjell*), Brooks contends the trial court prejudicially erred by instructing the jury with CALJIC No. 2.52 because identity of the perpetrator of the crimes in this case was in issue. We find no instructional error in this regard.

Contrary to Brooks's position he is relying on "more recent cases" to argue the flight instruction should not be given because identity is the main issue or an issue in the case, the California Supreme Court's more recent decision in *People v. Mason* (1991) 52 Cal.3d 909 (*Mason*), specifically disapproved the "overly broad dictum" in *Anjell* and cases following *Anjell* regarding use of the flight instruction when identity was a contested issue on which Brooks relies. (*Mason, supra*, 52 Cal.3d at p. 943, fn. 13.) The court in *Mason* stated, "[i]f there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. [Citation.] 'The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. [Citation.] The jury's need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.' [Citation.]" (*Ibid.*)

Further, as noted in the "Use Note" to CALJIC No. 2.52, "a flight instruction is correctly given when there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a

consciousness of guilt." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1245 (*Pensinger*).) The giving of CALJIC No. 2.52 is therefore proper when there is substantial evidence the defendant fled and such flight reflected a consciousness of guilt, regardless of the strength of the evidence the defendant was the person who committed the charged crimes. (*Pensinger, supra*, 52 Cal.3d at p. 1245; *Mason, supra*, 52 Cal.3d at p. 943, citing section 1127c.)

Here, although Brooks was not positively identified as the perpetrator of the robberies, he was positively identified by Hewitt and a police officer as the man who fled from Hewitt's car with the shotgun that discharged and was subsequently dropped on the night of February 19, 2002. This testimony provided enough evidence from which a reasonable jury could find flight to avoid apprehension and "that [Brooks's] movement was motivated by a consciousness of guilt." (*People v. Ray* (1996) 13 Cal.4th 313, 345.) The trial court properly instructed on flight in this case.

IV

Claimed Prosecutorial Misconduct

During closing argument, the prosecutor asked the jury "to go with the evidence, the state of the evidence as it exists and see if [the People] have met [their] burden. . . ." In this regard, the prosecutor discussed the difficulties the jury might have in following instructions to ignore stricken answers to questions and issues that had been raised but not fully developed or rebutted by the prosecution. For example, the prosecutor mentioned questions about a voice lineup and fingerprints that were not supported by any evidence. She also stated,

"What about other forensic, scientific tests? There was no blood or saliva or semen samples obtained in this case. There has been no mention of DNA testing, no attempts to collect DNA samples. You might be wondering about that. There is no mention about that in the state of the evidence in this case, but you have to go with what you have."

In a similar vein, the prosecutor noted that there was no evidence about the statements Brooks had made to the police, about another person being detained after the Henry's Market crimes were committed, or about certain exhibits shown during the trial but not entered into evidence. The prosecutor commented,

"One thing that hopefully will come into play here, if you had attempted to be distracted by these type of things, one is that both parties have had a chance to bring into court witnesses and the evidence they think may have assisted them. [¶] So if there was some evidence. . . relating to that person that was detained Mr. Brooks would have had an opportunity to bring that in if he felt that would point to his innocence, and that didn't happen. You'll have to go with what you have."

The prosecutor continued her argument, telling the jury it would have to decide the case on the evidence it had and then explaining how the admitted evidence, inconsistencies and all, satisfied the elements of the crimes charged.

During his closing argument, Brooks, over the prosecutor's objections, repeatedly explained away evidence as if testifying, and stated facts not in evidence. At some point he began discussing "ways to see if an individual . . . has had on his face mask, scientific ways. . . ." When he stated, "Now, DNA, if you have on a mask during a robbery and you're shouting obscenities you're doing a lot of spitting," the court sustained the prosecutor's objection, instructing the jury to disregard Brooks's argument. Even after the court sustained additional objections that there was no evidence to support his arguments,

Brooks continued to mention "DNA signatures on [the] mask" worn by an individual, that he had "realized that [he] needed science to aid in [his] ultimately being free," and that he had encountered paperwork to fill out as his own attorney for testing the mask. The court told the jury it must disregard Brooks's line of arguments, and admonished Brooks that if he continued with the same type of argument rather than moving to a different topic, it would assume Brooks was done with his argument. When the prosecutor objected to Brooks's next statement that he had "attempted to have tested these items," the court said Brooks "is done with his closing argument," and took its noon recess.

Before the afternoon session commenced, the court met with the prosecutor and Brooks about what "is and isn't appropriate argument and what is and isn't admissible in evidence." Although the court believed Brooks clearly understood "those parameters," it thought statements made by the prosecutor in her closing may have prompted Brooks to go into his repeated mention about the mask and DNA testing.⁷ The court specifically

⁷ Several times during trial, outside the jury's presence, the court considered Brooks's attempts to obtain the results of purported DNA testing of the mask. The court eventually found no due process violation in any failure to obtain DNA testing of the mask based on Brooks's voluntary delay in requesting such tests on the mask, which the court characterized as his tactical decision to attempt to "create error [in making] the appearance that there is something underhanded going on when actually there isn't." In addition, the court found that because the mask was obtained in a search of Brooks's motor home, it would probably already have his DNA on it and, even if it did not, the mask was found in his possession. Plus Brooks made statements to the police that he and others had been playing around with putting on the mask, so it would necessarily also have someone else's DNA on it. The court further noted that the subject of DNA testing was not in evidence before the jury, and regardless, Brooks had contaminated the mask by trying it on at trial during his cross-examination of a witness before he raised the issue of not obtaining discovery of the results of DNA testing of the mask. Brooks does not

told the prosecutor that, "[t]he last [statement for which it had sustained an objection] had to do with the testing of the mask, which [it] frankly [thought the prosecutor] asked for, in a comment she made in closing argument because she said . . . something to the effect that Mr. Brooks could have had [the mask] tested too." After noting Brooks had not objected to the prosecutor's comment which the court would have sustained, the court proposed it "strike that portion of [the prosecutor's] argument and emphasize that the defense has no burden to produce any evidence, and then to allow Mr. Brooks to argue as long as he stays out of those subjects that he knows [have] not been entered into evidence."

Although the prosecutor did not recall saying anything about having the mask tested, "out of an abundance of caution" she agreed with the court's proposal of striking any such argument and reminding the jury that Brooks did not have a burden of proof. Brooks, however, objected to the prosecutor's statements being stricken, arguing it would "falsely indicate that [he] was the first one to start talking about the DNA," or "bringing it up without any prompting on the side of the prosecution." Brooks represented he did not want the prosecutor's statements stricken and would then "just simply stay out of the areas that [he had] been instructed to stay out of." The court understood Brooks's tactical decision and advised him it would cut him off next time he mentioned things being tested, but would allow him to resume his argument.

raise any issue on appeal concerning the court's ruling regarding the DNA testing on the mask.

When the jury was brought back into court, Brooks resumed his closing argument, again often testifying and referring to facts not in evidence despite numerous sustained objections. The prosecutor's brief rebuttal argument merely stressed the "entire burden in this case [was on the prosecutor]," and that Brooks had "absolutely no burden[, h]e [did not] have to present any evidence[, and h]e [did not] have to prove a thing to [the jury]."

On appeal Brooks contends the prosecutor committed prejudicial misconduct by commenting on his failure to submit a mask for DNA testing thereby shifting the burden to him to prove his innocence. Aside from the fact that the prosecutor did not comment on Brooks's failure to submit a mask for DNA testing, Brooks has waived his claim of prosecutorial misconduct because he failed to timely object to the remarks the trial court construed as referring to the mask below or accept the court's offer of a curative admonition after striking those comments.

The law is well established that "[a] claim of prosecutorial misconduct is generally reviewable on appeal only if the defendant makes a timely objection at trial and asks the trial court to admonish the jury to disregard the prosecutor's question [or statement]. [Citations.] "[O]therwise, the point is reviewable only if an admonition would not have cured the harm." [Citation.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 279.) Here, because any conceivable harm could have been cured by the court's proposal to strike the now objected-to statements and admonish the jury not to consider such arguments, Brooks's failure to make a timely objection and ask the court to admonish the jury, or to accept the court's proposal, precludes him from now challenging as misconduct the comments by the prosecutor during closing argument he cites as misconduct.

We are not persuaded by Brooks's assertion that any objection would have been futile because an admonition would not have cured the harm caused by the prosecutor's improper arguments because they were "so egregious" and cut the heart out of his defense of mistaken identity. As the court noted, it would have sustained an objection if Brooks had made one to the brief comments uttered by the prosecutor regarding DNA evidence. Because the court had not repeatedly or erroneously overruled other objections made by Brooks, we cannot find that an objection to the prosecutor's comments during closing argument would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 821-822.) We also presume the jury would have followed any admonishment to ignore such statements and any inference they may have invoked. (*People v. Wash* (1993) 6 Cal.4th 215, 263.)

Further, as noted above, Brooks not only failed to object to the comments and ask for a curative admonition, he tactically refused the trial court's proposal to strike the prosecutor's comments and give a curative instruction. Under these circumstances, any possible error was not only waived, it was invited. (See *People v. Cooper* (1991) 53 Cal.3d 771, 827.)

Even if we treated the issue as properly preserved for review we would find the error harmless beyond a reasonable doubt. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 183.) The jury was correctly instructed on the law and their duty to decide the case based on the testimony of the witnesses and the evidence in the case and not on the arguments of counsel. (CALJIC No. 1.00.) The portion of the prosecutor's argument of which Brooks complains was brief, neutrally commented that neither party had presented any

forensic or DNA evidence, and only directed the jury's attention to the fact Brooks had failed to call a logical, exculpatory witness (the man who was detained in Pacific Beach the night of the Henry's Market robbery), which is permissible and does not shift the burden of proof to the defendant. (*People v. Hughes* (2002) 27 Cal.4th 287, 373.) Further, the prosecutor emphasized that she had the burden of proving Brooks's guilt beyond a reasonable doubt. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

In sum, we cannot conclude on this record, which shows the jury was properly instructed on the responsibility to determine what facts had been proved, the fact that statements and questions of counsel are not evidence, the credibility of witnesses, the elements of the offenses, and the prosecutor's burden of proof, that the unobjected to comments of the prosecutor during closing arguments rendered Brooks's trial fundamentally unfair. (See *People v. Bolton* (1979) 23 Cal.3d 208, 214.) No prejudicial prosecutorial misconduct is shown.

V

The New Trial Motion Based on Juror Misconduct

Brooks additionally asserts the trial court violated his state and federal constitutional rights to a fair trial by an impartial and unanimous jury when it denied his motion for new trial based on jury misconduct. We disagree.

Section 1181, subdivision (3) provides in pertinent part that a new trial may be granted, "When the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented." When a motion for new trial is brought on such grounds, the trial court must determine whether misconduct occurred and, if it did,

whether the misconduct was prejudicial. (*People v. Loot* (1998) 63 Cal.App.4th 694, 697.) A trial court's ruling declining to order a new trial on grounds of juror misconduct is subject to review for abuse of discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 667.) Our review of the factual history below in light of the pertinent law reveals the trial court did not abuse its discretion in denying Brooks's motion for new trial based on jury misconduct.

A. Factual History

After the trial had concluded, the court notified the prosecutor and defense counsel retained for sentencing it had received a letter from a juror (juror no. 8) and asked for comment on the date originally set for sentencing. In that letter, which was also sent to Brooks directly, juror no. 8 alleged that another juror had spoken with a witness, that yet another juror had spoken about the case outside the deliberation room, and that other jurors failed to give her an opportunity to voice her opinions during deliberations and pressured her to vote guilty. Defense counsel stated the letter raised questions of whether Brooks's constitutional rights had been protected with regard to jury selection and the jury deliberation process, and asked for a continuance. The court granted the request for a continuance to allow counsel to investigate and prepare for a new trial motion based on jury misconduct.

During a discussion on how much time to allow for the continuance, the court noted the parties had the name, address and telephone number of juror no. 8 and if they motioned for release of identifying information for the other jurors, "the odds are what [the court] would likely do is bring the jurors in and do it on the record in terms of any

inquiry so that it's limited to those areas that are appropriate under the law." If such a motion were brought, the court would set a hearing on the matter.

The prosecutor subsequently brought a motion to disclose juror identifying information and the court set a hearing on the matter. At that hearing on February 7, 2003, the court outlined its procedure of first bringing all the jurors into court, including the alternates, and explaining to them that they would be individually questioned about an issue that had been raised and advising them not to talk to each other about the case or about what they were questioned about. Then, one juror at a time, with juror no. 8 being first, would be in court for questioning by the court and each counsel, while another juror waited outside the courtroom and the rest waited in the jury lounge until called. Although the court advised counsel they could not ask the jurors questions as to their mental processes, it acknowledged juror no. 8 might be a problem because the prosecutor intended to impeach her with other letters written to Brooks since the first letter which were discovered by the jail authorities and turned over to the prosecution. At some point, the court also would be talking to the witness one of the jurors allegedly spoke to during trial.

When the court commenced the questioning of the jurors, juror no. 8 essentially complained that juror no. 1 had yelled at her twice during deliberations, once about her tardiness and wasting the other jurors' time, and again when she tried to make a point about police procedure, saying she had sworn she was not biased; that the other jurors had stared at her after the readback of Hewitt's testimony as if she were taking too much time; that one of the "stronger willed jurors" continued to state his opinions even when

she tried several times to express her disagreement; that some jurors expressed frustration with Brooks, calling him "homie" and using the term "ebonics;" that juror no. 6 had showed frustration with Brooks by hitting her jacket against the wall when she left one day and had spoken with juror no. 8 in the restroom about how long it took Brooks to make a point and that he needed help; that juror no. 10 had spoken with a witness in the hallway; that the jurors did not have enough time to evaluate the evidence because they spent an entire day giving their opinions of Brooks and commenting on how scary he looked in his booking photo; and that overall she felt pressured and "suppressed in [her] personal views."

Further questioning of juror no. 8 about her various complaints revealed that although juror no. 1 had become red in the face when he yelled across the table at juror no. 8, he did not get up from his seated position, and he had been calmed down by other jurors so that juror no. 8 did not feel physically threatened by him. Juror no. 8 also conceded she had been able to express her opinion that other jurors were improperly discussing Brooks's character and his booking photo; that many of her other opinions were expressed, heard and discussed; that no other juror except juror no. 1 yelled at her; and that when she was frustrated at being interrupted while making a point, she also was "loud" and continued to ensure her point was made. Juror no. 8 admitted the jury room environment was not so hostile or tense as to foreclose deliberations. She also stated she thought Hewitt had lied at trial, but when her testimony was read back, the parts she wanted to point out to support that opinion had been stricken, so she decided to vote guilty.

With regard to overhearing juror no. 10 speak with a witness in the hallway, juror no. 8 testified the conversation concerned how the witness got a job at the fire department and the realization they had mutual friends. Juror no. 8 did not hear juror no. 10 and the witness discuss the case. Nor had she made any attempt to tell the court or any court staff about the matter she had observed.

Juror no. 8 was then questioned about letters dated November 1, 26 and 27 of 2002, that she had written to Brooks after the trial. In the November 1 letter, she had indicated she had withheld information during voir dire about her "weed smoking habit" and her boyfriend's criminal history, she had offered to help Brooks with further legal proceedings, she had complimented him on the "extreme mastery" with which he had committed the robberies, and she had told him she found him exciting and beautiful. The November 26 and 27 letters were more familiar in tone than her first letter and acknowledged she had received some letters from Brooks. In addition to indicating she would give him money and library/research assistance for his case, juror no. 8 explicitly described her enjoyment of various forms of sex and her sexual fantasies about Brooks. She also indicated her boyfriend with whom she lived was an ex-gang member who had been convicted of assault and robbery, and who had been upset with her for not acquitting Brooks.

Despite the content of her letters, juror no. 8 denied having a romantic interest in Brooks. However, she conceded she had proposed to Brooks a way that they could conceal their correspondence, had lied during an interview with the prosecutor about not having received any correspondence from Brooks, and had lied to Brooks about her

boyfriend wanting her to acquit him. Juror no. 8 maintained she had not lied during voir dire or in her letters to Brooks about her boyfriend's criminal history because she only found out he had a robbery conviction after those times. She claimed she had exaggerated her boyfriend's criminal history to Brooks to flatter him and "basically put [herself] where he could talk to [her.]"

With regard to the alleged shouting, juror no. 1 conceded he had spoken strongly in his normally loud voice to juror no. 8 due to her tardiness, telling her she should "have more consideration for the rest of the jurors." The other jurors confirmed that juror no. 1 had a loud voice and that many jurors had to speak loudly to be heard because people were talking at the same time. The majority of the jurors said the exchange between juror no. 1 and juror no. 8 took place before the readback of Hewitt's testimony, and that another juror intervened to move the deliberations forward. Juror no. 1 had also wanted the readback and expressed how it helped him with his decision. After the readback, the jurors each had an opportunity to raise and discuss issues.

The majority of the jurors also testified that even though there were some heated discussions, every juror was given an opportunity to express his or her view, that juror no. 8 continued to participate in the deliberation process even after the so-called reprimand by juror no. 1, and that all the jurors wanted juror no. 8 to take her time in making a decision as to the verdict. The only juror that heard the word "homie" during deliberations said it was uttered by juror no. 8. No juror heard juror no. 6 discuss anything about the case outside the deliberation room, and no juror except juror no. 8 witnessed the conversation between juror no. 10 and a witness in the case.

The witness testified that after he left the courtroom one day, a juror spoke to him briefly to ask about how to get a job in the forest service as a firefighter. In their conversation which lasted no longer than a couple of minutes, the witness told the juror about a website and the application process. Juror no. 10 confirmed he had talked to the witness about where he could apply to become a firefighter. They did not speak about the witness's testimony or the case.

At the conclusion of the hearing, the parties were given time to "take whatever action [they thought was] appropriate in regard to any motions." Brooks subsequently filed his motion for new trial on grounds of jury misconduct, arguing the verdicts against him were not due to the fair and due consideration of the case or a fair expression of all the jurors, and that statements, conduct, conditions or events which occurred in or out of the jury room show the verdicts were improperly reached. At the hearing on the matter, Brooks's attorney cited juror no. 8's testimony she felt pressured to vote guilty in support of the new trial motion, conceding her credibility was the pivotal issue.

The trial judge denied the motion, finding that "[Juror no. 8] was not credible when she came in and she was testifying as to her interpretation of what occurred. [¶] Her interpretation, for the most part, was not supported by the other jurors. I found her not credible. [¶] . . . [¶] . . . Even if one juror yelled at her, when you look at totality of the circumstances of how that sequence of events occurred, and then the readback of the testimony, which truly was pivotal -- I mean, that was really the underpinning to everything. So, that was important testimony to have reread. [¶] And then I did not see anything that would be juror misconduct as far as the actions of the other jurors towards

her during the course of the deliberations in light of the case law, because I do think there had been, on occasion, some strong voices and words used. [¶] As a practical matter, [juror no. 8] was late with great regularity, and I'm sure [the other jurors] were a little frustrated with her in that regard. [¶] Even that would not be sufficient for a grant of a new trial based upon a finding of juror misconduct. . . . [¶] As to the juror who asked about being a firefighter, . . . [¶] . . . [¶] . . . [t]hat witness wasn't a pivotal witness, and everything that was testified to was [mostly] on a videotape. . . . [¶] . . . [I]t would have been better if it hadn't happened, but I don't think this was juror misconduct either as defined under the case law."

On appeal, Brooks only claims that "[t]he letters and testimony of [juror no. 8] showed she was unduly influenced and coerced into reaching her guilty verdicts." However, in reviewing claims of juror misconduct that allegedly deny a defendant his statutory and constitutional rights to a fair trial, "[w]e [generally] accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) The court here found juror no. 8 was "not credible," and such finding is fully supported by this record.

Not only did juror no. 8 fail to report any misconduct to the court during trial or deliberations, she only raised the issue of misconduct after she became personally involved with Brooks as evidenced by her letters. Juror no. 8 also admitted lying under oath and about having received correspondence from Brooks, about having a romantic or sexual interest in him, about her boyfriend's criminal history, and about attempting to

correspond with Brooks surreptitiously. In light of the other jurors' testimony discounting juror no. 8's various complaints of jury misconduct, and the inadmissibility of juror no. 8's testimony and statements in her letters regarding her thought processes (Evid. Code., § 1150, subd. (a)),⁸ the trial court could properly find juror no. 8's allegations of misconduct biased and unsupported. Therefore, the court did not abuse its discretion in denying the new trial motion because there was no credible evidence of jury misconduct.

Moreover, even if juror no. 8's allegations that juror no. 1 yelled at her in anger or frustration until his face turned red were true, such would not show jury misconduct. Heated disagreements do not constitute jury misconduct. (*People v. Orchard* (1971) 17 Cal.App.3d 568, 574.) "During deliberations, expressions of 'frustration, temper, and strong conviction may be anticipated . . . in the interest of free expression in the jury room." (*People v. Engleman* (2002) 28 Cal.4th 436, 446, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 541.) Because the totality of the evidence at the hearing on the matter revealed juror no. 8 continued to participate in the deliberations even after the heated exchange with juror no. 1, no prejudicial misconduct is shown.

⁸ Evidence Code section 1150, subdivision (a) states: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing [her] to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

In sum, the trial court properly denied Brooks's motion for new trial based on jury misconduct.

VI

The Count 8 Section 12022.53, Subdivision (c) Enhancement

In a supplemental brief, Brooks contends section 654 precludes a consecutive six-year, eight-month term for the section 12022.53, subdivision (c) firearm enhancement imposed for count 8.⁹ He specifically argues that the "notwithstanding" language in subdivision (c) of section 12022.53 does not preclude the application of section 654's multiple punishment prohibition; that the limitations of subdivision (f) of section 12022.53 do not preclude application of section 654;¹⁰ that lenity is required where the legislative intent, as here, is ambiguous; and that subsequent amendments of section 1170.11 ensures the applicability of section 654 to section 12022.53, subdivision (c).

Brooks's arguments appear to have been based on those raised in *People v. Oates* (2002) 97 Cal.App.4th 1172 with regard to the application of section 654 to enhancements under subdivision (d) of section 12022.53, which was granted review on July 24, 2002 (S106796). In a footnote in both his opening supplemental brief and in his

⁹ Section 12022.53, subdivision (c) states: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years."

Section 654, subdivision (a) provides that "An act or omission which is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

reply brief, Brooks recognized the assertions he was making with regard to section 12022.53 were pending before the California Supreme Court. That court has recently issued its opinion concerning those matters.

In *People v. Oates* (2004) 32 Cal.4th 1048 (*Oates*), our Supreme Court held, among other things, that section 654 does not preclude imposing multiple section 12022.53, subdivision (d) enhancements where there are multiple victims of crimes of violence. (*Oates, supra*, 32 Cal.4th at pp. 1062-1069.) In doing so, the court noted it was merely following long established law "that 'the limitations of section 654 do not apply to crimes of violence against multiple victims.' [Citation.]" (*Oates, supra*, 32 Cal.4th at pp. 1063-1064.) After extensively reviewing that law, the court found that "[n]othing in section 12022.53, or its legislative history suggests that the Legislature intended to alter operation of the 'multiple victim' exception to section 654[.]" and that "although section 12022.53 expressly limits the number of enhancements that may be imposed under the section 'for each crime' (§ 12022.53, subd. (f)), it contains no language limiting the number of enhancements that may be imposed under the section for separate crimes against multiple victims." (*Oates, supra*, 32 Cal.4th at p. 1066.)

The court in *Oates* also distinguished and disapproved the cases on which the defendant there relied, including *People v. Moringlane* (1982) 127 Cal.App.3d 811, and rejected defendant's reliance on the rule of lenity. (*Oates, supra*, 32 Cal.4th at pp. 1067-1068.) The court essentially found that defendant simply "ignore[d] the long-standing

¹⁰ Subdivision (f) of section 12022.53 provides that "Only one additional term of imprisonment under this section shall be imposed per person for each crime."

rule that the 'multiple victim' exception is part of section 654's normal operation." (*Oates, supra*, 32 Cal.4th at p. 1068.) Because the court based its decision on the "multiple victim" exception of section 654, it did not address "the People's argument [there] that section 654 does not apply to enhancements, or that the language of section 12022.53 independently creates an exception to section 654." (*Oates, supra*, 32 Cal.4th at p. 1066, fn. 7.)

Here, the People advanced the same arguments in opposition to Brooks's contention the application of 654 precluded the imposition of a consecutive term for the count 8 section 12022.53 enhancement, as in *Oates*: that section 654 does not apply to enhancements, the language of section 12022.53 creates an exception to section 654's multiple punishment prohibition, and that, even if section 654 did apply to section 12022.53, subdivision (c) enhancements, the multiple victim exception to section 654 would permit imposition of such enhancement for each of Brooks's robbery convictions. (*Oates, supra*, 32 Cal.4th at p. 1062.) The court in *Oates* found the last argument dispositive. (*Id.* at p. 1063.) We similarly find that *Oates* is fully dispositive here of the issue whether the court could properly impose a term for the section 12022.53, subdivision (c) firearm enhancement accompanying the count 8 robbery.

Although *Oates* concerned the imposition of multiple enhancements for a single personal injury from use of a firearm (§ 12022.53, subd. (d)), the reasoning is the same for the use of a firearm where no injury is involved. (See *Oates, supra*, 32 Cal.4th at pp. 1066-1067.) In this case, Brooks was convicted of five robberies involving five different victims and allegations he used a firearm within the meaning of section 12022.53,

subdivision (c). Robbery is one of the specified felonies in subdivision (a) of section 12022.53 that qualifies for the enhancement defined in subdivision (c) of that section and as a crime of violence for purposes of applying the section 654 "multiple victim" exception. (§ 12022.53, subd. (a)(4); *People v. King* (1993) 5 Cal.4th 59, 78.) Because count 8 referred to a different victim than the other robbery counts, the "multiple victim" exception applied and section 654 did not preclude the trial court from imposing a term for the section 12022.53, subdivision (c) accompanying that count. No sentencing error is shown.¹¹

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

¹¹ As in *Oates*, our resolution based on the "multiple victim" exception of section 654 renders it unnecessary to address whether section 654 applies to enhancements or whether "the language of section 12022.53 independently creates an exception to section 654." (*Oates, supra*, 32 Cal.4th at p. 1066, fn. 7.)